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MEMORANDUM

TO: Fredric A. Yerke
FROM: Mark S. Hennigh
SUBJECT: Anaconda Aluminum
DATE: June 14, 1976

Facts

In 1955 Anaconda Aluminum Company commenced operating an aluminum reduction plant near Columbia Falls, Montana. The original plant had two pot line buildings containing the pots necessary for the electrolytic reduction of molten aluminum. In 1965 a third pot line was put into operation and in late 1968 a fourth and a fifth pot line commenced operating.

Plaintiffs, Carrol A. Wright and Myrna Wright, residents of Flathead County, Montana, allege that the volume of hydrocarbon and fluoride emissions cast onto their land has reached an intolerable level as the result of Anaconda's construction of the additional pot lines in 1968.

The plaintiffs claim injury to their livestock and animals resulting from ingestion of plant life containing fluorides emitted from the Anaconda Aluminum plant. The plaintiffs also claim that increased fluoride emissions from the defendant's plant have permanently damaged vegetation and timber on their property and have

caused a reduction in the market value of their land.

The plaintiffs fix their damages at \$42,451 and seek treble damages by virtue of R.C.M., Sec. 17-503, 1947, amounting to \$127,353.

The Montana statute of limitations bars recovery prior to September 3, 1968, two years prior to the date of the filing of the complaint. R.C.M., Sec. 93-2607, 1947.

Issue

What is the measure of damages for livestock, timber, and land permanently damaged by fluoride and hydrocarbon emissions from the Anaconda Aluminum plant?

Discussion

A. Livestock

The question of damages for the injury to the livestock and animals is addressed in 4 Restatement of the Law of Torts, § 928 (1939):

"Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for

"(a) the difference between the value of the chattel before the harm and the value after the harm or, at the plaintiff's election, the reasonable cost of repair or restoration where feasible, with due allowance for any difference between the original value and the value after repairs, and

"(b) the loss of use."

e.g. Ohio Oil Company v. Elliott, 254 F2d 832, 835 (10th Cir 1958).

Should the plaintiffs choose market value depreciation, the measure of damages would be the difference between the market value of the livestock on September 3, 1968, the earliest date of

recovery allowable under the statute of limitations, and the market value of the livestock at the time of trial. Sherman Gas & Electric Co. v. Belden, 103 Tex 59, 123 SW 119 (1909); 58 Am Jur2d Nuisances § 121 (1971).

Rehabilitation of livestock suffering from fluorosis is probably not possible. However, if it is, and if the cost is reasonable, the plaintiffs may elect to collect the cost of rehabilitation in lieu of the depreciation in market value.

In addition, the plaintiffs are entitled to recover the value of the loss of use of the livestock during the period from September 3, 1968, to the date of trial. Comment on Clause (b) 4 Restatement of the Law of Torts § 928 (1939).

B. Land and Timber

If the emissions of fluorides and hydrocarbons from the defendant's aluminum plant are likely to continue and if the operation of the aluminum plant will not be enjoined, the plaintiffs may recover damages for both past and prospective injury to their land and timber.

The rule governing past and prospective damages is stated in the 4 Restatement of the Law of Torts, § 930 (1939):

"(2) The damages for past and prospective invasions of land include

"(a) compensation for harm caused by invasions prior to the time when the injurious situation became complete and comparatively enduring and

"(b) compensation for

"i. the amount of diminution in the value of the land caused by the prospect of the continuance of the invasion measured at the time when the injurious situation became complete and comparatively enduring, or

"ii. the reasonable cost to the plaintiff of avoiding future invasions.

* * *

"Illustration:

"1. The A company, making illuminating gas from coal, established its plant near B's extensive greenhouse and florist establishment in 1930. The operations of the gas plant began in 1931 and fumes and smoke invaded the greenhouse and damaged the flowers. This damage, small at first, reached a peak in June, 1932, when the gas plant first began to be operated to full capacity. It has since been carried on at the same level, and the damage to B's business has continued. In 1933 B sues A for damages, and at the trial elects complete compensation, once for all. B's damages will be measured by the loss of flowers and loss of profits down to June, 1932, and in addition, by the difference between what a reasonable purchaser would have given for the property and business in June, 1932, in view of the existing and prospective nuisance, and what he would have given if it were not there. No damages will be given for loss of flowers and profits from June, 1932, down to the time of trial."

See Reynolds Metals Company v. I. B. Wand, 308 F2d 504, 508 (9th Cir 1962); Barci v. Intalco Aluminum Corporation, 11 Wash App 342, 522 P2d 1159, 1168 (1974).

In this case, the injurious situation became complete when the fourth and fifth pot lines went into full operation in late 1968. Past damages would, therefore, be recoverable in the period from September 3, 1968, up to the time when the new pot lines were operating at full capacity. The measure of these past damages would be the loss of market value of the land between these two dates. Barci v. Intalco Aluminum Corporation, supra, at 1168.

Prospective damages are measured by the difference between how much a reasonable purchaser would pay for the plaintiffs' land with and without the prospect of continued invasion of fluoride and

hydrocarbon particles from the Anaconda Aluminum plant. This depreciation in property value would be measured at the date in late 1968 when the fourth and fifth pot lines were in full operation.

The plaintiffs may elect to collect only for past damages and not for prospective damages. If the plaintiffs so choose, they will not be entitled to collect for actual invasions of their property occurring after the date the injurious situation was found to be complete and enduring. Comment on Subsection (2), 4 Restatement of the Law of Torts § 930 (1939). Further recovery by the plaintiffs would be limited to the loss of market value of their property as measured on the date the offending pot lines were operating at full capacity.

Conclusion

The damages recoverable for the injury to the plaintiffs' livestock and animals is the diminution, if any, in the market value of the livestock and animals between September 3, 1968, and the date of trial or the reasonable cost of restoring the animals to their original condition. Plaintiffs may also recover the value of the loss of use of the animals during the same period.

The measure of damages for past permanent damage to plaintiffs' property and trees is the diminution in market value measured between September 3, 1968, and the date the fourth and fifth pot lines reached full operation. The measure of damages for prospective damage to plaintiffs' property and trees is the depreciation in the value of the land caused by the prospect of continued invasion of the

plaintiffs' property by fluoride and hydrocarbon emissions from defendant's plant. This depreciation in value is measured from the time the fourth and fifth pot lines went into full production.